No. 83-407

In the Supreme Court of the United States

October Term, 1983

LLOYD VICKROY,
Petitioner,

vs.

CITY OF SPRINGFIELD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI FROM THE U.S. EIGHTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Petition for Writ of Certiorari untimely, and therefore unreviewable by this Court?
2. Did the district and appellate courts err in holding that the City of Springfield, a municipal corporation, could not be held liable under 42 U.S.C. Sec. 1983 on the theory of respondeat superior?
3. Did the district and appellate courts err in holding that the actions of a City of Springfield police officer did not rise to a constitutional violation under the Fourth and Fourteenth Amendments?
4. Do the issues in this case present special and important questions sufficient to warrant the issuance of a writ of certiorari?

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STATEMENT OF THE CASE

On the afternoon of May 28, 1980, Springfield Police Officer Bill Bragg was notified of a disturbance at 1531 North O'Hara, Springfield, Missouri, the residence of Ms. Cindy Mordue. Upon his arrival at the residence, Officer Bragg was informed by Ms. Mordue that one George

Thomas Mordue had just left her residence after threatening her with a knife and telling her he would kill her if she continued to press charges against him. Ms. Mordue had previously filed felonious restraint charges against Mr. Mordue. Ms. Mordue gave Officer Bragg Mordue's description and told him she thought he was heading for the bus station.

Officer Bragg related these facts to Donald L. Sanders, Assistant Prosecuting Attorney for Greene County, Missouri, who issued a directive to the Police Department that George Mordue be arrested on probable cause under the charge of intimidating a witness. In the meantime, the police dispatcher broadcast Mordue's description, that he was wanted for intimidating a witness, that he could be dangerous, and that he might be located at the local bus station.

Officer John D. Baugh was on routine patrol in the vicinity of the bus station and heard the radio dispatch. He noticed the Petitioner seated in the bus station, determined that he fit the description of Mordue, and approached the Petitioner and requested identification. Petitioner at first protested, but then produced identification which satisfied Officer Baugh that Petitioner was not Mr. Mordue. The officer then left the building.

Petitioner, acting pro se, first brought this action pursuant to 42 U.S.C. Sec. 1983 in the U.S. District Court for the State of California. The case was dismissed for lack of jurisdiction over the defendant, City of Springfield, and for failure to state a cause of action. The Ninth Circuit Court of Appeals affirmed the dismissal on the question of jurisdiction and ruled it was unnecessary to reach the issue of whether the complaint stated a cause of action.

Petitioner then refiled his action in U.S. District Court, Western District of Missouri, Southern Division. The City of Springfield, the only defendant in the cause, moved for summary judgment pursuant to Rule 56, Fed. R. Civ. P. based upon the pleadings and affidavits attached to the motion. The U.S. District Court granted the motion on the grounds that the defendant, City of Springfield, was not liable under 42 U.S.C. Sec. 1983 on the theory of respondeat superior and that the actions of the City police officer did not rise to the level of a constitutional violation. The Eighth Circuit Court of Appeals affirmed the judgment of the district court.

SUMMARY OF ARGUMENT

A. 28 U.S.C. Sec. 2101(c) establishes time limits for petitions for writs of certiorari. The rule states that a writ of certiorari shall be applied for within ninety days after the entry of a judgment or decree. The Eighth Circuit Court of Appeals entered its judgment in this cause May 6, 1983. Petitioner did not file his petition until on or about September 1, 1983. The Petition is therefore jurisdictionally out of time and may be refused by the Clerk of this Court. (Rule 20.3 Supreme Court Rules) Petitioner's motion to extend time should be denied because he has not established good cause for the extension.

B. The district court did not err in holding that the City of Springfield, a municipal corporation, was not liable under 42 U.S.C. Sec. 1983 on the theory of respondeat superior. A municipality may not be held responsible for the constitutional torts of its officers or employees under the theory of respondeat superior. The district court correctly concluded that the Petitioner failed to carry the

burden of proof as to whether the City of Springfield pursued a policy or custom of discrimination which would result in the imposition of liability under 42 U.S.C. Sec. 1983.

C. The district court did not err in holding that the actions of the police officer did not, as a matter of law, rise to a constitutional violation under the Fourth and Fourteenth Amendments.

Officer Baugh had probable cause to question Petitioner regarding his identity, and to tell Petitioner that if he refused to identify himself he would be subject to arrest. Although Officer Baugh's threat to arrest Petitioner if he refused to identify himself may have constituted a seizure under the Fourth Amendment, it was a reasonable, not an arbitrary seizure, and was not in violation of Petitioner's constitutional rights.

D. None of the considerations articulated by this Court in Rule 17, Supreme Court Rules, indicating the types of cases which the Court considers reviewable on a petition for certiorari, are present in this case. The holdings of the district court and Court of Appeals are not in conflict with other court decisions. Federal questions decided in this case are harmonious with federal questions decided by other courts. This case does not present such novel federal questions that this Court need issue a final definitive opinion. Nor are the holdings of the lower courts in conflict with the applicable decisions of this Court. This Court should deny the petition for writ of certiorari.

ARGUMENT

A. The Petition for Writ of Certiorari Is Untimely According to 28 U.S.C. Sec. 2101(c) and Should Therefore Be Denied.

28 U.S.C. Sec. 2101(c) establishes the time limits for the presentation of petitions for writs of certiorari to this Court. The rule states:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit, or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment of decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

The Eighth Circuit Court of Appeals entered its judgment in this cause May 6, 1983. The 90-day time limit for Petitioner to file a petition for writ of certiorari expired on August 4, 1983. Petitioner filed his petition for writ of certiorari September 1, 1983, a full four weeks after the deadline for the submission of the petition according to Sec. 2101(c).

Nineteen days after it received the petition for writ of certiorari, Respondent received Petitioner's motion to extend time to file petition for certiorari. Petitioner has not presented any facts which would establish good cause for the delay. Delays in printing and layout are foreseeable events which could easily have been avoided by the Petitioner. The fact that four attorneys refused to assist Petitioner detracts from, rather than supports Petitioner's

argument for good cause. These attorneys saw no valid claim and declined to represent him. Petitioner had nearly three months to prepare his writ. This amount of time was adequate, especially in light of the brevity of his petition. Petitioner's motion to extend time should be denied.

B. The City of Springfield, Missouri, a Municipal Corporation, Cannot Be Liable Under 42 U.S.C. Sec. 1983 on the Theory of Respondeat Superior.

In his petition for writ of certiorari, Petitioner claims that the District Court erred in providing sovereign immunity to the City of Springfield, a municipal corporation. (Petition for Writ of Certiorari, p. 3) Contrary to Petitioner's allegation, the District Court did not hold that the City of Springfield was exempt from suit under a sovereign immunity theory. Instead, the court held that the City of Springfield could not be held liable under 42 U.S.C. Sec. 1983 on the theory of respondeat superior.

Since this Court decided *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), it has been uniformly clear that a municipality may not be held liable on the theory of respondeat superior for the constitutional torts of its employees. In order to impose liability on a municipality under *Monell*, a civil rights plaintiff must show his injury resulted from a discriminatory policy or custom pursued by the municipality.

> "We conclude, therefore, that a local government may not be sued under §1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." (*Id.* at 694)

In the instant case, Petitioner's initial complaint merely alleged, "An agent of the defendant did . . . demand the identification of plaintiff, thereby violating his right to privacy." (Appeal, Exhibit 11, p. 1) Petitioner did not allege that the officer's actions were taken pursuant to any unconstitutional policy or custom of the City of Springfield. Even had Petitioner alleged an unconstitutional policy in his complaint, the City amply demonstrated that such a policy was not in effect. As part of its motion for summary judgment the City filed a number of affidavits from its Mayor, its City Manager, and its Chief of Police, all disclaiming any policy, custom or practice on the part of the City which would tend to deny Petitioner his constitutional rights. (Defendant's Motion for Summary Judgment, Appeal, Exhibit 27)

Petitioner did not introduce any evidence of an affirmative link between the policies of the City of Springfield and the acts of its police officer which resulted in the denial of his constitutional rights. *Tarpley v. Greene*, 684 F.2d 1 (D.C. Cir. 1982) (No *Monell* claim because defendants were not directly involved with police misconduct.) Petitioner did not allege that the City of Springfield had knowledge of a pattern of unconstitutional acts by its police department but failed to take steps to remedy those patterns. *Turpin v. Mailet*, 619 F.2d 196 (2nd Cir. 1980) (Municipality may be held liable if its inaction amounts to deliberate indifference to or tacit authorization of unconstitutional acts by its police officers.)

Petitioner has only argued that, "Use of police powers are acts of the City Legislature. Policy, custom, and practice are also permitted and have not been shown to be limited by any act of City legislation." (Petition for Certiorari, p. 4) A mere allegation that a municipality may exercise policy, custom, and practice is wholly insufficient

to support a claim alleging violating of one's constitutional rights.

C. The Actions of the City Police Officer Do Not, As a Matter of Law, Rise to the Level of a Constitutional Violation.

The Eighth Circuit Court of Appeals found that Officer Baugh's brief detention of Petitioner fell within the reasonableness requirement of the Fourth Amendment. The Court concluded that even though Officer Baugh's threat to arrest Petitioner if he did not identify himself constituted a seizure, under the circumstances, that seizure was imminently reasonable. (Petition for Certiorari, Appendix B) The City's affidavits reveal that Officer Baugh was acting in accordance with instructions received from the Greene County Prosecutor. Probable cause existed to believe that George Thomas Mordue had committed the felony of tampering with a witness, that he was believed to be fleeing the jurisdiction and might be located at the bus station. (Sanders affidavit)

Baugh arrived at the bus station, observed the Petitioner, and concluded that he fit the description of Mordue. (Baugh affidavit) Baugh requested identification of the Petitioner, Petitioner refused. Baugh then informed him that on the basis of the radio description, he believed there was probable cause to arrest him on reasonable belief that he was Mordue until his identification could be verified. When the Petitioner produced identification indicating he was not Mordue, the officer thanked him and left. (Baugh affidavit)

Petitioner relies upon *Brown v. Texas*, 443 U.S. 47 (1979) as authority for his contention that a municipal corporation does not have the right, "to demand identification

from a person under the lesser requirements of administrative probable cause rather than the requirements of criminal probable cause." (Petition for Writ of Certiorari, p. 3) Petitioner misreads *Brown's* holding. *Brown* involved a situation in which police officers, acting without probable cause, arrested a detainee after he refused to identify himself. The man was later convicted under a Texas statute making it a crime to refuse to identify oneself to a police officer.

In the instant case, the district court and the Court of Appeals found that Officer Baugh was acting with sufficient probable cause to request identification from the Petitioner. The District Court in its order stated,

> "Where the person believed to have committed a crime is being sought by government officials, his name is known and his general appearance is known, surely it cannot be a violation of a person's Fourth Amendment rights for an officer to demand identification if his general appearance is that of the person being sought."

Furthermore, Petitioner's detention in this case falls within the permissible limits of invasions of privacy enunciated by this Court in *Brown* (*supra*), and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). That is, to test the constitutionality of seizures such as the one in the instant case, the courts must weigh the gravity of public concerns served by the seizure, and the degree to which the seizure advances the public interest, against the severity of the interference with personal liberty. In Petitioner's case, the public concern underlying the seizure was substantial. A felon was attempting to flee the jurisdiction. He previously threatened his ex-wife with a knife, and told her he would kill her if she pursued the charges against him.

On the other hand, the invasion of Petitioner's privacy was slight. The District Court noted that there was nothing overly obtrusive about Officer Baugh's request for identification from the Petitioner. Officer Baugh stated that the Petitioner remained seated during their conversation. When Petitioner produced identification, the officer thanked him and left. The entire length of the conversation could not have lasted more than a few minutes. Officer Baugh's action was not arbitrary, instead it rested upon specific objective facts, indicating that society's legitimate interests required the seizure of the person thought to be George Mordue. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). Under these circumstances, it cannot be said that the brief detention of Petitioner for questioning was a violation of his Fourth and Fourteenth Amendment rights.

D. The Writ of Certiorari Should Be Denied Since the Issues Presented Herein Are Not of a Sufficient Character to Warrant This Court's Intervention.

This Court has delineated the class of questions it considers proper for review by writ of certiorari. (Rule 17, Supreme Court Rules) While these categories are not controlling in determining whether this Court will hear a case, they do provide guidance for those litigants seeking an avenue of review. None of the enumerated considerations set out in Rule 17 are present in the instant case. The holdings of the District Court and Court of Appeals are in accord with those of other courts that have addressed the same issues. (See, re: reasonableness of detention; *United States v. Leyba*, 627 F.2d 1059, cert. den. 101 S.Ct. 406, 449 U.S. 987, 66 L.Ed.2d 250 (1980); *United States v. Magda*, 547 F.2d 756, cert. den. 98 S.Ct. 230, 434 U.S. 878, 54 L.Ed.2d 157 (1976). See also, re: no municipal

liability under respondeat superior; *Turpin; Tarpley; supra*). The Eighth Circuit Court of Appeals' decision complies rather than conflicts with the decisions of this Court. (See *Brown, Prouse, supra*). No novel issues concerning interpretation of federal law are set forth in this case which would require their ultimate resolution by this Court.

The instant case is an example of precisely the type of case this Court intended to refrain from reviewing when it drafted Rule 17.

CONCLUSION

The District and Appellate Courts held under the undisputed facts that there was no violation of Petitioner's Fourth and Fourteenth Amendment rights. Officer Baugh was not required to know the identity of the Petitioner before approaching him and asking for identification. As the District Court emphasized, it cannot be a violation of a person's Fourth Amendment rights for an officer to demand identification if his general appearance is comparable to that of the person being sought.

Petitioner has failed to set forth evidence of a policy, practice or custom on the part of the City of Springfield, which would result in it being liable under 42 U.S.C. Sec. 1983. Instead, Petitioner has attempted to hold the City liable under the theory of respondeat superior.

The Petitioner also failed to allege that there are special and important reasons present in his case which would compel this Court to issue a writ of certiorari.

Furthermore, Petitioner's application for writ of certiorari is untimely and he has not shown that good cause

existed for the delay. For these reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF COUNSEL AS TO SERVICE

Three copies of the foregoing document were served upon the party whose name is set forth below, by depositing same in the mail, on this 29th day of September, 1983.

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